

SECURITIES AND EXCHANGE COMMISSION

[Investment Company Act Release No. 28235; 812-13430]

ALPS Advisers, Inc., et al.; Notice of Application

April 9, 2008

Agency: Securities and Exchange Commission (“Commission”)

Action: Notice of an application for an order under section 6(c) of the Investment Company Act of 1940 (the “Act”) for an exemption from sections 2(a)(32), 5(a)(1), 22(d), 22(e), and 24(d) of the Act and rule 22c-1 under the Act, under section 12(d)(1)(J) for an exemption from sections 12(d)(1)(A) and (B) of the Act, and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and (a)(2) of the Act.

Summary of Application: Applicants request an order that would permit (a) series of open-end management investment companies to issue shares (“Fund Shares”) that can be redeemed only in large aggregations (“Creation Unit Aggregations”); (b) secondary market transactions in Fund Shares to occur at negotiated prices; (c) dealers to sell Fund Shares to purchasers in the secondary market unaccompanied by a prospectus when prospectus delivery is not required by the Securities Act of 1933 (“Securities Act”); (d) certain series to pay redemption proceeds, under certain circumstances, more than seven days after the tender of a Creation Unit Aggregation for redemption; (e) certain affiliated persons of the series to deposit securities into, and receive securities from, the series in connection with the purchase and redemption of Creation Unit Aggregations; and (f) certain registered management investment companies and unit investment trusts outside of the same group of investment companies as the series to acquire Fund Shares.

Applicants: ALPS Advisers, Inc. (the “Adviser”), ALPS ETF Trust (the “Trust”), and ALPS Distributors, Inc. (the “Distributor”).

Filing Dates: The application was filed on October 2, 2007, and amended on February 28, 2008. Applicants have agreed to file an amendment during the notice period, the substance of which is reflected in the notice.

Hearing or Notification of Hearing: An order granting the application will be issued unless the Commission orders a hearing. Interested persons may request a hearing by writing to the Commission’s Secretary and serving applicants with a copy of the request, personally or by mail. Hearing requests should be received by the Commission by 5:30 p.m. on April 30, 2008, and should be accompanied by proof of service on applicants, in the form of an affidavit, or for lawyers, a certificate of service. Hearing requests should state the nature of the writer’s interest, the reason for the request, and the issues contested. Persons who wish to be notified of a hearing may request notification by writing to the Commission’s Secretary.

Addresses: Secretary, U.S. Securities and Exchange Commission, 100 F Street, NE, Washington, DC 20549-1090; Applicants, c/o Tané T. Tyler, Esq., ALPS Fund Services, Inc., P.O. Box 328, Denver, CO 80201-0328.

For Further Information Contact: Courtney S. Thornton, Senior Counsel at (202) 551-6812, or Mary Kay Frech, Branch Chief, at (202) 551-6821 (Division of Investment Management, Office of Investment Company Regulation).

Supplementary Information: The following is a summary of the application. The complete application may be obtained for a fee at the Public Reference Desk, U.S.

Securities and Exchange Commission, 100 F Street, NE, Washington DC 20549-1520, telephone (202) 551-5850.

Applicants' Representations:

1. The Trust is registered as an open-end management investment company and is organized as a Delaware statutory trust. The Trust will offer Fund Shares of the Cohen & Steers Global Realty Majors ETF (the "Initial Fund"), a series of the Trust, which will track an index of selected U.S. and non-U.S. real estate equity securities. Applicants may establish one or more registered investment companies in the future ("Future Funds," collectively with the Initial Fund, "Funds"), either as separate trusts or as separate series of one or more trusts, which will be advised by the Adviser or an entity controlling, controlled by, or under common control with the Adviser.<sup>1</sup>

2. The Adviser will serve as the investment adviser to the Initial Fund. The Adviser is registered as an investment adviser under the Investment Advisers Act of 1940 ("Advisers Act"). In the future, the Adviser may enter into sub-advisory agreements with other investment advisers to act as sub-advisers ("Sub-Advisers") with respect to the Funds. Any Sub-Adviser will be registered under the Advisers Act. The Distributor, a broker-dealer ("Broker") registered under the Securities Exchange Act of 1934 (the "Exchange Act"), will serve as the principal underwriter and distributor for the Initial Fund. Each of the Adviser and the Distributor is a Colorado corporation and a wholly owned subsidiary of ALPS Holdings, Inc.

3. Each Fund will hold certain securities ("Portfolio Securities") selected to correspond generally to the price and yield performance, before fees and expenses, of a

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<sup>1</sup> All existing entities that intend to rely on the requested order have been named as applicants. Any other existing or future entity that subsequently relies on the order will comply with the terms and conditions of the application.

specified equity securities index (an “Underlying Index”). Each Underlying Index will be comprised of equity securities issued by (a) domestic issuers and non-domestic issuers meeting the requirements for trading in U.S. markets (“Domestic Index”), or (b) foreign equity securities or a combination of domestic and foreign securities (“Foreign Index”). No entity that creates, compiles, sponsors or maintains an Underlying Index (an “Index Provider”) is or will be an affiliated person, as defined in section 2(a)(3) of the Act, or an affiliated person of an affiliated person, of the Trust, the Adviser, the Distributor, promoter or any Sub-Adviser to a Fund.

4. The investment objective of each Fund will be to provide investment results that correspond generally to the price and yield performance, before fees and expenses, of its Underlying Index. Intra-day values of the Underlying Index will be disseminated every 15 seconds throughout the trading day. A Fund will utilize either a “replication” or “representative sampling” strategy.<sup>2</sup> A Fund using a replication strategy will invest in substantially all of the Component Securities in its Underlying Index in approximately the same weightings as in the Underlying Index. In certain circumstances, such as when there are practical difficulties or substantial costs involved in holding every security in an Underlying Index or when a Component Security is illiquid, a Fund may use a representative sampling strategy pursuant to which it will invest in some, but not all of the relevant Component Securities.<sup>3</sup> Applicants anticipate that a Fund that utilizes a

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<sup>2</sup> Applicants represent that a Fund will normally invest at least 80% of its total assets in the component securities that comprise its Underlying Index (“Component Securities”) or, in the case of Funds that track a Foreign Index (“Foreign Funds”), Component Securities and depositary receipts representing such securities. Each Fund also may invest up to 20% of its assets in certain futures, options and swap contracts, cash and cash equivalents, as well as in stocks not included in its Underlying Index, but which the Adviser believes will help the Fund track its Underlying Index.

<sup>3</sup> Under the representative sampling strategy, the Adviser will seek to construct a Fund's portfolio so that its market capitalization, industry weightings, fundamental investment characteristics (such as return variability, earnings valuation and yield) and liquidity measures perform like those of the Underlying Index.

representative sampling strategy will not track the performance of its Underlying Index with the same degree of accuracy as an investment vehicle that invests in every Component Security of the Underlying Index in the same weighting as the Underlying Index. Applicants expect that each Fund will have a tracking error relative to the performance of its Underlying Index of less than 5 percent.

5. Fund Shares will be sold in Creation Unit Aggregations of 25,000 to 200,000 Fund Shares.<sup>4</sup> All orders to purchase Creation Unit Aggregations must be placed with the Distributor by or through a party that has entered into an agreement with the Distributor (“Authorized Participant”). An Authorized Participant must be either: (a) a broker-dealer or other participant in the continuous net settlement system of the National Securities Clearing Corporation (“NSCC”), a clearing agency registered with the Commission, or (b) a participant in the Depository Trust Company (“DTC”, and such participant, “DTC Participant”). Fund Shares generally will be sold in Creation Unit Aggregations in exchange for an in-kind deposit by the purchaser of a portfolio of securities designated by the Adviser or the Sub-Adviser to correspond generally to the price and yield performance of the relevant Underlying Index (the “Deposit Securities”), together with the deposit of a specified cash payment (“Balancing Amount”). The Balancing Amount is generally an amount equal to the difference between (a) the net asset value (“NAV”) (per Creation Unit Aggregation) of the Fund and (b) the total aggregate market value (per Creation Unit Aggregation) of the Deposit Securities.<sup>5</sup>

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<sup>4</sup> The number of Fund Shares per Creation Unit Aggregation of the Initial Fund will be 50,000. The initial estimated price per Fund Share of the Initial Fund will be \$50.

<sup>5</sup> The Trust will sell Creation Unit Aggregations of each Fund on any day that the New York Stock Exchange, the American Stock Exchange, LLC (“AMEX”), a Fund, and the custodian are open for business, including as required by section 22(e) of the Act (a “Business Day”). Each Business Day, prior to the opening of trading on the Exchange (defined below), the list of names and amount of each security

Applicants state that in some circumstances it may not be practicable or convenient for a Fund to operate exclusively on an “in-kind” basis. The Trust reserves the right to permit, under certain circumstances, a purchaser of Creation Unit Aggregations to substitute cash in lieu of depositing some or all of the requisite Deposit Securities.

6. An investor purchasing a Creation Unit Aggregation from a Fund will be charged a fee (“Transaction Fee”) to prevent the dilution of the interests of the remaining shareholders resulting from costs in connection with the purchase of Creation Unit Aggregations.<sup>6</sup> The exact amounts of Transaction Fees relevant to each Fund (including the maximum Transaction Fee) will be fully disclosed in the prospectus of such Fund (“Prospectus”), and the method for calculating the Transaction Fees will be disclosed in each Prospectus or statement of additional information (“SAI”). All orders to purchase Creation Unit Aggregations will be placed with the Distributor by or through an Authorized Participant, and it will be the Distributor's responsibility to transmit such orders to the Funds. The Distributor also will be responsible for delivering a Prospectus to those persons purchasing Creation Unit Aggregations, and for maintaining records of both the orders placed with it and the confirmations of acceptance furnished by it. In addition, the Distributor will maintain a record of the instructions given to the applicable Fund to implement the delivery of Fund Shares.

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constituting the current Deposit Securities and the Balancing Amount, effective as of the previous Business Day, will be made available. Any national securities exchange as defined in section 2(a)(26) of the Act (each, an “Exchange”) on which Fund Shares are listed will disseminate, every 15 seconds during its regular trading hours, through the facilities of the Consolidated Tape Association, an amount per Fund Share representing the sum of the estimated Balancing Amount and the current value of the Deposit Securities.

<sup>6</sup> Where a Fund permits a purchaser to substitute cash in lieu of depositing a portion of the requisite Deposit Securities, the purchaser may be assessed a higher Transaction Fee to cover the cost of purchasing such Deposit Securities, including brokerage costs, and part or all of the spread between the expected bid and the offer side of the market relating to such Deposit Securities.

7. Purchasers of Fund Shares in Creation Unit Aggregations may hold such Fund Shares or may sell such Fund Shares into the secondary market. Fund Shares will be listed and traded on the AMEX; Fund Shares of Future Funds will be listed and traded on an Exchange. It is expected that one or more member firms of a listing Exchange will be designated to act as a specialist and maintain a market for Fund Shares trading on the Exchange (a “Specialist”), or if NASDAQ is the listing Exchange, one or more member firms of NASDAQ will act as a market maker (“Market Maker”) and maintain a market for Fund Shares.<sup>7</sup> Prices of Fund Shares trading on an Exchange will be based on the current bid/offer market. Fund Shares sold in the secondary market will be subject to customary brokerage commissions and charges.

8. Applicants expect that purchasers of Creation Unit Aggregations will include institutional investors and arbitrageurs (which could include institutional investors). A Specialist, or Market Maker, in providing a fair and orderly secondary market for the Fund Shares, also may purchase Creation Unit Aggregations for use in its market-making activities. Applicants expect that secondary market purchasers of Fund Shares will include both institutional investors and retail investors.<sup>8</sup> Applicants expect that the price at which Fund Shares trade will be disciplined by arbitrage opportunities created by the ability to continually purchase or redeem Creation Unit Aggregations at

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<sup>7</sup> If Fund Shares are listed on NASDAQ, no particular Market Maker will be contractually obligated to make a market in Fund Shares, although NASDAQ's listing requirements stipulate that at least two Market Makers must be registered as Market Makers in Fund Shares to maintain the listing. Registered Market Makers are required to make a continuous, two-sided market at all times or be subject to regulatory sanctions.

<sup>8</sup> Fund Shares will be registered in book-entry form only. DTC or its nominee will be the registered owner of all outstanding Fund Shares. DTC or DTC Participants will maintain records reflecting beneficial owners of Fund Shares.

their NAV, which should ensure that Fund Shares will not trade at a material discount or premium in relation to their NAV.

9. Fund Shares will not be individually redeemable, and owners of Fund Shares may acquire those Fund Shares from the Fund, or tender such Fund Shares for redemption to the Fund, in Creation Unit Aggregations only. To redeem, an investor will have to accumulate enough Fund Shares to constitute a Creation Unit Aggregation. Redemption orders must be placed by or through an Authorized Participant. An investor redeeming a Creation Unit Aggregation generally will receive (a) a portfolio of securities designated to be delivered for Creation Unit Aggregation redemptions on the date that the request for redemption is submitted (“Fund Securities”), which may not be identical to the Deposit Securities required to purchase Creation Unit Aggregations on that date, and (b) a “Cash Redemption Payment,” consisting of an amount calculated in the same manner as the Balancing Amount, although the actual amount of the Cash Redemption Payment may differ from the Balancing Amount if the Fund Securities are not identical to the Deposit Securities on that day.<sup>9</sup> An investor may receive the cash equivalent of a Fund Security in certain circumstances, such as if the investor is constrained from effecting transactions in the security by regulation or policy. A redeeming investor will be subject to a Transaction Fee, calculated in the same manner as a Transaction Fee payable in connection with purchases of Creation Unit Aggregations.

10. Neither the Trusts nor any individual Fund will be marketed or otherwise held out as an “open-end investment company” or a “mutual fund.” Instead, each Fund

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<sup>9</sup> The Funds will comply with the federal securities laws in accepting Deposit Securities and satisfying redemptions with Fund Securities, including that the Deposit Securities and Fund Securities are sold in transactions that would be exempt from registration under the Securities Act. As a general matter, the Deposit Securities and Fund Securities will correspond pro rata to the securities held by each Fund.



will be marketed as an “exchange-traded fund,” an “investment company,” a “fund,” or a “trust.” All marketing materials that describe the features or method of obtaining, buying or selling Fund Shares, or refer to redeemability, will prominently disclose that Fund Shares are not individually redeemable and that the owners of Fund Shares may purchase or redeem Fund Shares from the Fund in Creation Unit Aggregations only. The same approach will be followed in the SAI, shareholder reports and investor educational materials issued or circulated in connection with the Fund Shares. The Funds will provide copies of their annual and semi-annual shareholder reports to DTC Participants for distribution to beneficial owners of Fund Shares.

Applicants’ Legal Analysis:

1. Applicants request an order under section 6(c) of the Act for an exemption from sections 2(a)(32), 5(a)(1), 22(d), 22(e), and 24(d) of the Act and rule 22c-1 under the Act, under section 12(d)(1)(J) for an exemption from sections 12(d)(1)(A) and (B) of the Act, and under sections 6(c) and 17(b) of the Act for an exemption from sections 17(a)(1) and 17(a)(2) of the Act.

2. Section 6(c) of the Act provides that the Commission may exempt any person, security or transaction, or any class of persons, securities or transactions, from any provision of the Act, if and to the extent that such exemption is necessary or appropriate in the public interest and consistent with the protection of investors and the purposes fairly intended by the policy and provisions of the Act. Section 17(b) of the Act authorizes the Commission to exempt a proposed transaction from section 17(a) of the Act if evidence establishes that the terms of the transaction, including the consideration to be paid or received, are reasonable and fair and do not involve overreaching on the part

of any person concerned, and the proposed transaction is consistent with the policies of the registered investment company and the general provisions of the Act. Section 12(d)(1)(J) of the Act provides that the Commission may exempt any person, security, or transaction, or any class or classes of persons, securities or transactions, from any provisions of section 12(d)(1) if the exemption is consistent with the public interest and the protection of investors.

Sections 5(a)(1) and 2(a)(32) of the Act

3. Section 5(a)(1) of the Act defines an “open-end company” as a management investment company that is offering for sale or has outstanding any redeemable security of which it is the issuer. Section 2(a)(32) of the Act defines a redeemable security as any security, other than short-term paper, under the terms of which the owner, upon its presentation to the issuer, is entitled to receive approximately his proportionate share of the issuer’s current net assets, or the cash equivalent. Because Fund Shares will not be individually redeemable, applicants request an order that would permit the Trusts to register as open-end management investment companies and issue Fund Shares that are redeemable in Creation Units Aggregations only. Applicants state that investors may purchase Fund Shares in Creation Unit Aggregations and redeem Creation Unit Aggregations from each Fund. Applicants further state that because the market price of Fund Shares will be disciplined by arbitrage opportunities, investors should be able to sell Fund Shares in the secondary market at prices that do not vary substantially from their NAV.

Section 22(d) of the Act and Rule 22c-1 under the Act

4. Section 22(d) of the Act, among other things, prohibits a dealer from selling a redeemable security, which is currently being offered to the public by or through a principal underwriter, except at a current public offering price described in the prospectus. Rule 22c-1 under the Act generally requires that a dealer selling, redeeming or repurchasing a redeemable security do so only at a price based on its NAV. Applicants state that secondary market trading in Fund Shares will take place at negotiated prices, not at a current offering price described in a Prospectus, and not at a price based on NAV. Thus, purchases and sales of Fund Shares in the secondary market will not comply with section 22(d) of the Act and rule 22c-1 under the Act. Applicants request an exemption under section 6(c) from these provisions.

5. Applicants assert that the concerns sought to be addressed by section 22(d) of the Act and rule 22c-1 under the Act with respect to pricing are equally satisfied by the proposed method of pricing Fund Shares. Applicants maintain that while there is little legislative history regarding section 22(d), its provisions, as well as those of rule 22c-1, appear to have been designed to (a) prevent dilution caused by certain riskless-trading schemes by principal underwriters and contract dealers, (b) prevent unjust discrimination or preferential treatment among buyers, and (c) ensure an orderly distribution of investment company shares by eliminating price competition from dealers offering shares at less than the published sales price and repurchasing shares at more than the published redemption price.

6. Applicants believe that none of these purposes will be thwarted by permitting Fund Shares to trade in the secondary market at negotiated prices. Applicants

state that (a) secondary market trading in Fund Shares does not involve the Funds as parties and cannot result in dilution of an investment in Fund Shares, and (b) to the extent different prices exist during a given trading day, or from day to day, such variances occur as a result of third-party market forces, such as supply and demand. Therefore, applicants assert that secondary market transactions in Fund Shares will not lead to discrimination or preferential treatment among purchasers. Finally, applicants contend that the proposed distribution system will be orderly because competitive forces in the marketplace will ensure that the difference between the market price of Fund Shares and their NAV remains narrow.

#### Section 24(d) of the Act

7. Section 24(d) of the Act provides, in relevant part, that the prospectus delivery exemption provided to dealer transactions by section 4(3) of the Securities Act does not apply to any transaction in a redeemable security issued by an open-end investment company. Applicants seek relief from section 24(d) to permit dealers selling Fund Shares in the secondary market to rely on the prospectus delivery exemption provided by section 4(3) of the Securities Act.<sup>10</sup>

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<sup>10</sup> Applicants state that they are not seeking relief from the prospectus delivery requirement for non-secondary market transactions, such as transactions in which an investor purchases Fund Shares from the Trust or an underwriter. Applicants further state that each Prospectus will caution broker-dealers and others that some activities on their part, depending on the circumstances, may result in their being deemed statutory underwriters and subject them to the prospectus delivery and liability provisions of the Securities Act. For example, a broker-dealer firm and/or its client may be deemed a statutory underwriter if it purchases Creation Unit Aggregations from a Fund, breaks them down into the constituent Fund Shares, and sells those Fund Shares directly to customers, or if it chooses to couple the creation of a supply of new Fund Shares with an active selling effort involving solicitation of secondary market demand for Fund Shares. Each Prospectus will state that whether a person is an underwriter depends upon all of the facts and circumstances pertaining to that person's activities. Each Prospectus will caution dealers who are not "underwriters" but are participating in a distribution (as contrasted to ordinary secondary market trading transactions), and thus dealing with Fund Shares that are part of an "unsold allotment" within the meaning of section 4(3)(C) of the Securities Act, that they would be unable to take advantage of the prospectus delivery exemption provided by section 4(3) of the Securities Act.

8. Applicants state that Fund Shares are bought and sold in the secondary market in the same manner as closed-end fund shares. Applicants note that transactions in closed-end fund shares are not subject to section 24(d), and thus closed-end fund shares are sold in the secondary market without a prospectus. Applicants contend that Fund Shares likewise merit a reduction in the unnecessary compliance costs and regulatory burdens resulting from the imposition of the prospectus delivery obligations in the secondary market. Because Fund Shares will be listed on an Exchange, prospective investors will have access to information about the product over and above what is normally available about an open-end security. Applicants state that information regarding market price and volume will be continually available on a real time basis throughout the day on brokers' computer screens and other electronic services. The previous day's price and volume information for Fund Shares will be published daily in the financial section of newspapers. In addition, a website will be maintained that will include each Prospectus and SAI, the relevant Underlying Index for each Fund, and additional quantitative information that is updated on a daily basis, including the mid-point of the bid-ask spread at the time of the calculation of NAV ("Bid/Ask Price"),<sup>11</sup> the NAV for each Fund, and information about the premiums and discounts at which the Fund Shares have traded.

9. Applicants will arrange for broker-dealers selling Fund Shares in the secondary market to provide purchasers with a product description ("Product Description") that describes, in plain English, the relevant Fund and the Fund Shares it issues. Applicants state that a Product Description is not intended to substitute for a full

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<sup>11</sup> The Bid/Ask Price per Fund Share of a Fund is determined using the highest bid and the lowest offer on the Exchange on which the Fund Shares are listed.

Prospectus. Applicants state that the Product Description will be tailored to meet the information needs of investors purchasing Fund Shares in the secondary market.

Section 22(e)

10. Section 22(e) generally prohibits a registered investment company from suspending the right of redemption or postponing the date of payment of redemption proceeds for more than seven days after the tender of a security for redemption. The principal reason for the requested exemption is that settlement of redemptions for the Foreign Funds is contingent not only on the settlement cycle of the United States market, but also on currently practicable delivery cycles in local markets for underlying foreign securities held by the Foreign Funds. Applicants state that local market delivery cycles for transferring certain foreign securities to investors redeeming Creation Unit Aggregations, together with local market holiday schedules, will under certain circumstances require a delivery process in excess of seven calendar days for the Foreign Funds. Applicants request relief under section 6(c) of the Act from section 22(e) to allow the Foreign Funds to pay redemption proceeds up to 14 calendar days (or, with respect to future Foreign Funds, within not more than the number of calendar days known to applicants as being the maximum number of calendar days required for such payment or satisfaction in the principal local foreign market(s) where transactions in Portfolio Securities of each such Fund customarily clear and settle) after the tender of a Creation Unit Aggregation for redemption. At all other times and except as disclosed in the relevant Prospectus and/or SAI, applicants expect that each Foreign Fund will be able to deliver redemption proceeds within seven days.<sup>12</sup> With respect to future Foreign Funds,

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<sup>12</sup> Rule 15c6-1 under the Exchange Act requires that most securities transactions be settled within three business days of the trade. Applicants acknowledge that no relief obtained from the requirements of

applicants seek the same relief from section 22(e) only to the extent that circumstances similar to those described in the application exist.

11. Applicants state that section 22(e) was designed to prevent unreasonable, undisclosed and unforeseen delays in the payment of redemption proceeds. Applicants assert that the requested relief will not lead to the problems that section 22(e) was designed to prevent. Applicants state that the SAI will disclose those local holidays (over the period of at least one year following the date of the SAI), if any, that are expected to prevent the delivery of redemption proceeds in seven calendar days, and the maximum number of days needed to deliver the proceeds for the relevant Foreign Fund. Applicants are not seeking relief from section 22(e) with respect to Foreign Funds that do not effect in-kind purchases and redemptions of Creation Unit Aggregations.

Section 12(d)(1)

12. Section 12(d)(1)(A) of the Act prohibits a registered investment company from acquiring securities of an investment company if such securities represent more than 3% of the total outstanding voting stock of the acquired company, more than 5% of the total assets of the acquiring company, or, together with the securities of any other investment companies, more than 10% of the total assets of the acquiring company.

Section 12(d)(1)(B) of the Act prohibits a registered open-end investment company, its principal underwriter and any other broker-dealer from selling the investment company's shares to another investment company if the sale will cause the acquiring company to own more than 3% of the acquired company's voting stock, or if the sale will cause more

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section 22(e) will affect any obligations applicants may have under rule 15c6-1.

than 10% of the acquired company's voting stock to be owned by investment companies generally.

13. Applicants request an exemption to permit management investment companies (“Purchasing Management Companies”) and unit investment trusts (“Purchasing Trusts”) registered under the Act that are not sponsored or advised by the Adviser or any entity controlling, controlled by, or under common control with the Adviser and are not part of the same “group of investment companies,” as defined in section 12(d)(1)(G)(ii) of the Act, as the Trusts (Purchasing Management Companies and Purchasing Trusts collectively, “Purchasing Funds”) to acquire shares of a Fund beyond the limits of section 12(d)(1)(A). Purchasing Funds exclude registered investment companies that are, or in the future may be, part of the same group of investment companies within the meaning of section 12(d)(1)(G)(ii) of the Act as the Funds. In addition, applicants seek relief to permit the Funds or any Broker that is registered under the Exchange Act to sell Fund Shares to a Purchasing Fund in excess of the limits of section 12(d)(1)(B).

14. Each Purchasing Management Company will be advised by an investment adviser within the meaning of section 2(a)(20)(A) of the Act (the “Purchasing Fund Adviser”) and may be sub-advised by one or more investment advisers within the meaning of section 2(a)(20)(B) of the Act (each a “Purchasing Fund Sub-Adviser”). Any investment adviser to a Purchasing Fund will be registered under the Advisers Act. Each Purchasing Trust will be sponsored by a sponsor (“Sponsor”).

15. Applicants submit that the proposed conditions to the relief requested, including the requirement that Purchasing Funds enter into an agreement with a Fund for



the purchase of Fund Shares (a “Purchasing Fund Agreement”), adequately address the concerns underlying the limits in section 12(d)(1)(A) and (B), which include concerns about undue influence, excessive layering of fees and overly complex structures.

Applicants believe that the requested exemption is consistent with the public interest and the protection of investors.

16. Applicants believe that neither the Purchasing Funds nor a Purchasing Fund Affiliate would be able to exert undue influence over the Funds.<sup>13</sup> To limit the control that a Purchasing Fund may have over a Fund, applicants propose a condition prohibiting a Purchasing Fund Adviser or a Sponsor, any person controlling, controlled by, or under common control with a Purchasing Fund Adviser or Sponsor, and any investment company and any issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act that is advised or sponsored by a Purchasing Fund Adviser or Sponsor, or any person controlling, controlled by, or under common control with a Purchasing Fund Adviser or Sponsor (“Purchasing Fund Advisory Group”) from controlling (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The same prohibition would apply to any Purchasing Fund Sub-Adviser, any person controlling, controlled by or under common control with the Purchasing Fund Sub-Adviser, and any investment company or issuer that would be an investment company but for sections 3(c)(1) or 3(c)(7) of the Act (or portion of such investment company or issuer) advised or sponsored by the Purchasing Fund Sub-Adviser or any person controlling, controlled by or under common control with the

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<sup>13</sup> A “Purchasing Fund Affiliate” is a Purchasing Fund Adviser, Purchasing Fund Sub-Adviser, Sponsor, promoter, and principal underwriter of a Purchasing Fund, and any person controlling, controlled by, or under common control with any of those entities. A “Fund Affiliate” is an investment adviser, promoter, or principal underwriter of a Fund and any person controlling, controlled by, or under common control with any of these entities.

Purchasing Fund Sub-Adviser (“Purchasing Fund Sub-Advisory Group”). Applicants propose other conditions to limit the potential for undue influence over the Funds, including that no Purchasing Fund or Purchasing Fund Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to purchase a security in any offering of securities during the existence of any underwriting or selling syndicate of which a principal underwriter is an Underwriting Affiliate (“Affiliated Underwriting”). An “Underwriting Affiliate” is a principal underwriter in any underwriting or selling syndicate that is an officer, director, member of an advisory board, Purchasing Fund Adviser, Purchasing Fund Sub-Adviser, employee or Sponsor of a Purchasing Fund, or a person of which any such officer, director, member of an advisory board, Purchasing Fund Adviser, Purchasing Fund Sub-Adviser, employee, or Sponsor is an affiliated person (except any person whose relationship to the Fund is covered by section 10(f) of the Act is not an Underwriting Affiliate).

17. Applicants do not believe the proposed arrangement will involve excessive layering of fees. The board of directors or trustees of any Purchasing Management Company, including a majority of the disinterested directors or trustees, will find that the advisory fees charged to the Purchasing Management Company are based on services provided that will be in addition to, rather than duplicative of, services provided under the advisory contract(s) of any Fund in which the Purchasing Management Company may invest. In addition, a Purchasing Fund Adviser or a trustee (“Trustee”) or Sponsor of a Purchasing Trust will waive fees otherwise payable to it by the Purchasing Management Company or Purchasing Trust in an amount at least equal to any compensation (including fees received pursuant to any plan adopted by a Fund under

rule 12b-1 under the Act) received by the Purchasing Fund Adviser or Trustee or Sponsor to the Purchasing Trust or an affiliated person of the Purchasing Fund Adviser, Trustee or Sponsor, from the Funds in connection with the investment by the Purchasing Management Company or Purchasing Trust in the Fund. Applicants state that any sales loads or service fees charged with respect to shares of a Purchasing Fund will not exceed the limits applicable to a fund of funds set forth in Conduct Rule 2830 of the NASD.

18. Applicants submit that the proposed arrangement will not create an overly complex fund structure. Applicants note that no Fund may acquire securities of any investment company or company relying on sections 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act. Applicants also represent that to ensure that Purchasing Funds comply with the terms and conditions of the requested relief from section 12(d)(1), any Purchasing Fund that intends to invest in a Fund in reliance on the requested order will be required to enter into a Purchasing Fund Agreement between the Fund and the Purchasing Fund. The Purchasing Fund Agreement will require the Purchasing Fund to adhere to the terms and conditions of the requested order. The Purchasing Fund Agreement also will include an acknowledgement from the Purchasing Fund that it may rely on the order only to invest in the Funds and not in any other investment company. The Purchasing Fund Agreement will further require any Purchasing Fund that exceeds the 5% or 10% limitations in section 12(d)(1)(A)(ii) and (iii) to disclose in its prospectus that it may invest in ETFs, and to disclose, in “plain English,” in its prospectus the unique characteristics of the Purchasing Funds investing in exchange-traded funds (“ETFs”), including but not limited to the expense structure and any additional expenses of investing in ETFs.

19. Applicants also note that a Fund may choose to reject a direct purchase of Fund Shares in Creation Unit Aggregations by a Purchasing Fund. To the extent that a Purchasing Fund purchases Fund Shares in the secondary market, a Fund would still retain its ability to reject initial purchases of Fund Shares made in reliance on the requested order by declining to enter into the Purchasing Fund Agreement prior to any investment by a Purchasing Fund in excess of the limits of section 12(d)(1)(A).

Section 17(a)(1) and (2) of the Act

20. Section 17(a) of the Act generally prohibits an affiliated person of a registered investment company, or an affiliated person of such a person, from selling any security to or purchasing any security from the company. Section 2(a)(3) of the Act defines “affiliated person” to include any person directly or indirectly owning, controlling or holding with power to vote 5% or more of the outstanding voting securities of the other person, any person 5% or more of whose outstanding voting securities are directly or indirectly owned, controlled or held with the power to vote by the other person, and any person directly or indirectly controlling, controlled by or under common control with the other person. Section 2(a)(9) of the Act provides that a control relationship will be presumed where one person owns more than 25% of another person's voting securities.

21. Applicants request an exemption from section 17(a) of the Act pursuant to sections 17(b) and 6(c) of the Act to permit persons to effectuate in-kind purchases and redemptions with a Fund when they are affiliated persons, or affiliated persons of affiliated persons, of the Fund solely by virtue of one or more of the following: (a) holding 5 percent or more, or in excess of 25 percent, of the outstanding Fund Shares of one or more Funds; (b) having an affiliation with a person with an ownership interest

described in (a); or (c) holding 5 percent or more, or more than 25 percent, of the shares of one or more other registered investment companies (or series thereof) advised by the Adviser.

22. Applicants assert that no useful purpose would be served by prohibiting these types of affiliated persons from purchasing or redeeming Creation Unit Aggregations through “in-kind” transactions. The deposit procedures for both in-kind purchases and in-kind redemptions of Creation Unit Aggregations will be the same for all purchases and redemptions. Deposit Securities and Fund Securities will be valued in the same manner as Portfolio Securities. Therefore, applicants state that in-kind purchases and redemptions will afford no opportunity for these affiliated persons of a Fund, or the affiliated persons of such affiliated persons, to effect a transaction detrimental to other holders of Fund Shares. Applicants also believe that in-kind purchases and redemptions will not result in self-dealing or overreaching of the Funds.

23. Applicants also seek relief from section 17(a) to permit a Fund that is an affiliated person of a Purchasing Fund because the Purchasing Fund holds 5% or more of the Fund Shares of the Fund to sell its Fund Shares to and redeem its Fund Shares from a Purchasing Fund and to engage in the accompanying in-kind transactions with the Purchasing Fund.<sup>14</sup> Applicants note that Creation Unit Aggregations that are purchased or redeemed directly from a Fund will be based on the NAV of the Fund.<sup>15</sup> Applicants

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<sup>14</sup> Applicants acknowledge that receipt of compensation by (a) an affiliated person of a Purchasing Fund, or an affiliated person of such person, for the purchase by the Purchasing Fund of Fund Shares or (b) an affiliated person of a Fund, or an affiliated person of such person, for the sale by the Fund of its Fund Shares to a Purchasing Fund may be prohibited by section 17(e)(1) of the Act. The Purchasing Fund Agreement also will include this acknowledgement.

<sup>15</sup> Applicants believe that a Purchasing Fund will purchase Fund Shares in the secondary market and will not purchase or redeem Creation Unit Aggregations directly from a Fund. Nonetheless, a Purchasing Fund that owns 5% or more of a Fund could seek to transact in Creation Unit Aggregations directly with a Fund pursuant to the section 17(a) relief requested.

believe that any proposed transactions directly between the Funds and Purchasing Funds will be consistent with the policies of each Purchasing Fund. The purchase of Creation Unit Aggregations by a Purchasing Fund directly from a Fund will be accomplished in accordance with the investment restrictions of any such Purchasing Fund and will be consistent with the investment policies set forth in the Purchasing Fund's registration statement. The Purchasing Fund Agreement will require any Purchasing Fund that purchases Creation Unit Aggregations directly from a Fund to represent that the purchase of Creation Unit Aggregations from a Fund by a Purchasing Fund will be accomplished in compliance with the investment restrictions of the Purchasing Fund and will be consistent with the investment policies set forth in the Purchasing Fund's registration statement.

Applicants' Conditions:

Applicants agree that any order granting the requested relief will be subject to the following conditions:

ETF Relief

1. As long as the Trust operates in reliance on the requested order, Fund Shares will be listed on an Exchange.
2. Neither the Trust nor any Fund will be advertised or marketed as an open-end investment company or a mutual fund. Each Prospectus will prominently disclose that Fund Shares are not individually redeemable shares and will disclose that the owners of Fund Shares may acquire those Fund Shares from the Fund and tender those Fund Shares for redemption to the Fund in Creation Unit Aggregations only. Any advertising material that describes the purchase or sale of Creation Unit Aggregations or

refers to redeemability will prominently disclose that Fund Shares are not individually redeemable, and that owners of Fund Shares may acquire those Fund Shares from the Fund and tender those Fund Shares for redemption to the Fund in Creation Unit Aggregations only.

3. The website maintained for the Funds, which will be publicly accessible at no charge, will contain the following information, on a per Fund Share basis, for each Fund: (a) the prior Business Day's NAV and the Bid/Ask Price, and a calculation of the premium or discount of the Bid/Ask Price at the time of calculation of the NAV against such NAV; and (b) data in chart format displaying the frequency distribution of discounts and premiums of the daily Bid/Ask Price against the NAV, within appropriate ranges, for each of the four previous calendar quarters. In addition, the Product Description for each Fund will state that the website for the Fund has information about the premiums and discounts at which Fund Shares have traded.

4. Each Prospectus and annual report also will include: (a) the information listed in condition 3(b), (i) in the case of the Prospectus, for the most recently completed year (and the most recently completed quarter or quarters, as applicable) and (ii) in the case of the annual report, for the immediately preceding five years, as applicable; and (b) the following data, calculated on a per Fund Share basis for one, five and ten year periods (or life of the Fund): (i) the cumulative total return and the average annual total return based on NAV and Bid/Ask Price, and (ii) the cumulative total return of the relevant Underlying Index.

5. Before a Fund may rely on the order, the Commission will have approved, pursuant to rule 19b-4 under the Exchange Act, an Exchange rule requiring Exchange

members and member organizations effecting transactions in Fund Shares to deliver a Product Description to purchasers of Fund Shares.

6. Each Prospectus and Product Description will clearly disclose that, for purposes of the Act, Fund Shares are issued by the Fund, which is a registered investment company, and that the acquisition of Fund Shares by investment companies is subject to the restrictions of section 12(d)(1) of the Act, except as permitted by an exemptive order that permits registered investment companies to invest in a Fund beyond the limits in section 12(d)(1), subject to certain terms and conditions, including that the registered investment company enter into a Purchasing Fund Agreement with a Fund regarding the terms of the investment.

7. The requested relief to permit ETF operations will expire on the effective date of any Commission rule under the Act that provides relief permitting the operation of index-based exchange-traded funds.

#### Section 12(d)(1) Relief

8. The members of a Purchasing Fund Advisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. The members of a Purchasing Fund Sub-Advisory Group will not control (individually or in the aggregate) a Fund within the meaning of section 2(a)(9) of the Act. If, as a result of a decrease in the outstanding Fund Shares of a Fund, a Purchasing Fund Advisory Group or a Purchasing Fund Sub-Advisory Group, each in the aggregate, becomes a holder of more than 25% of the outstanding Fund Shares of a Fund, it will vote its Fund Shares in the same proportion as the vote of all other holders of the Fund Shares. This condition does not apply to the Purchasing Fund Sub-Advisory Group with respect to a



Fund for which the Purchasing Fund Sub-Adviser or a person controlling, controlled by, or under common control with the Purchasing Fund Sub-Adviser acts as the investment adviser within the meaning of section 2(a)(20)(A) of the Act.

9. No Purchasing Fund or Purchasing Fund Affiliate will cause any existing or potential investment by the Purchasing Fund in a Fund to influence the terms of any services or transactions between the Purchasing Fund or Purchasing Fund Affiliate and the Fund or a Fund Affiliate.

10. The board of directors or trustees of a Purchasing Management Company, including a majority of the disinterested directors or trustees, will adopt procedures reasonably designed to ensure that the Purchasing Fund Adviser and Purchasing Fund Sub-Adviser are conducting the investment program of the Purchasing Management Company without taking into account any consideration received by the Purchasing Management Company or a Purchasing Fund Affiliate from a Fund or a Fund Affiliate in connection with any services or transactions.

11. No Purchasing Fund or Purchasing Fund Affiliate (except to the extent it is acting in its capacity as an investment adviser to a Fund) will cause a Fund to purchase a security in any Affiliated Underwriting.

12. Before investing in a Fund in excess of the limits in section 12(d)(1)(A), each Purchasing Fund and the Fund will execute a Purchasing Fund Agreement stating, without limitation, that their boards of directors or trustees and their investment advisers or sponsors and trustees, as applicable, understand the terms and conditions of the order, and agree to fulfill their responsibilities under the order. At the time of its investment in Fund Shares in excess of the limit in section 12(d)(1)(A)(i), a Purchasing Fund will notify

the Fund of the investment. At such time, the Purchasing Fund will also transmit to the Fund a list of the names of each Purchasing Fund Affiliate and Underwriting Affiliate. The Purchasing Fund will notify the Fund of any changes to the list of names as soon as reasonably practicable after a change occurs. The relevant Fund and the Purchasing Fund will maintain and preserve a copy of the order, the agreement, and the list with any updated information for the duration of the investment and for a period of not less than six years thereafter, the first two years in an easily accessible place.

13. The Purchasing Fund Adviser, Trustee or Sponsor, as applicable, will waive fees otherwise payable to it by the Purchasing Fund in an amount at least equal to any compensation (including fees received under any plan adopted by a Fund under rule 12b-1 under the Act) received from a Fund by the Purchasing Fund Adviser, Trustee or Sponsor, or an affiliated person of the Purchasing Fund Adviser, Trustee or Sponsor, other than any advisory fees paid to the Purchasing Fund Adviser, Trustee or Sponsor, or its affiliated person by a Fund, in connection with the investment by the Purchasing Fund in the Fund. Any Purchasing Fund Sub-Adviser will waive fees otherwise payable to the Purchasing Fund Sub-Adviser, directly or indirectly, by the Purchasing Management Company in an amount at least equal to any compensation received from a Fund by the Purchasing Fund Sub-Adviser, or an affiliated person of the Purchasing Fund Sub-Adviser, other than any advisory fees paid to the Purchasing Fund Sub-Adviser or its affiliated person by the Fund, in connection with the investment by the Purchasing Management Company in a Fund made at the direction of the Purchasing Fund Sub-Adviser. In the event that the Purchasing Fund Sub-Adviser waives fees, the benefit of the waiver will be passed through to the Purchasing Management Company.

14. Any sales charges and/or service fees charged with respect to shares of a Purchasing Fund will not exceed the limits applicable to a fund of funds as set forth in Conduct Rule 2830 of the NASD.

15. Once an investment by a Purchasing Fund in the securities of a Fund exceeds the limit in section 12(d)(1)(A)(i) of the Act, the board of directors/trustees of a Fund (“Board”), including a majority of the disinterested Board members, will determine that any consideration paid by the Fund to a Purchasing Fund or a Purchasing Fund Affiliate in connection with any services or transactions: (a) is fair and reasonable in relation to the nature and quality of the services and benefits received by the Fund; (b) is within the range of consideration that the Fund would be required to pay to another unaffiliated entity in connection with the same services or transactions; and (c) does not involve overreaching on the part of any person concerned. This condition does not apply with respect to any services or transactions between a Fund and its investment adviser(s), or any person controlling, controlled by, or under common control with such investment adviser(s).

16. The Board, including a majority of the disinterested Board members, will adopt procedures reasonably designed to monitor any purchases of securities by a Fund in an Affiliated Underwriting once the investment by a Purchasing Fund in a Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, including any purchases made directly from an Underwriting Affiliate. The Board will review these purchases periodically, but no less frequently than annually, to determine whether the purchases were influenced by the investment by the Purchasing Fund in a Fund. The Board will consider, among other things: (a) whether the purchases were consistent with the investment objectives and

policies of the Fund; (b) how the performance of securities purchased in an Affiliated Underwriting compares to the performances of comparable securities purchased during a comparable period of time in underwritings other than Affiliated Underwritings or to a benchmark such as a comparable market index; and (c) whether the amount of securities purchased by the Fund in Affiliated Underwritings and the amount purchased directly from an Underwriting Affiliate have changed significantly from prior years. The Board will take any appropriate actions based on its review, including, if appropriate, the institution of procedures designed to assure that purchases of securities in Affiliated Underwritings are in the best interests of shareholders of the Fund.

17. Each Fund will maintain and preserve permanently in an easily accessible place a written copy of the procedures described in the preceding condition, and any modifications to such procedures, and will maintain and preserve for a period of not less than six years from the end of the fiscal year in which any purchase in an Affiliated Underwriting occurred, the first two years in an easily accessible place, a written record of each purchase of securities in Affiliated Underwritings, once an investment by a Purchasing Fund in shares of the Fund exceeds the limit of section 12(d)(1)(A)(i) of the Act, setting forth from whom the securities were acquired, the identity of the underwriting syndicate's members, the terms of the purchase, and the information or materials upon which the Board's determinations were made.

18. Before approving any advisory contract under section 15 of the Act, the board of directors or trustees of each Purchasing Management Company, including a majority of the disinterested directors or trustees, will find that the advisory fees charged under such contract are based on services provided that will be in addition to, rather than

duplicative of, the services provided under the advisory contract(s) of any Fund in which the Purchasing Management Company may invest. These findings and their basis will be recorded fully in the minute books of the appropriate Purchasing Management Company.

19. No Fund will acquire securities of any other investment company or companies relying on sections 3(c)(1) or 3(c)(7) of the Act in excess of the limits contained in section 12(d)(1)(A) of the Act.

For the Commission, by the Division of Investment Management, under delegated authority.

Florence E. Harmon  
Deputy Secretary